

DEC 7 1979

THOMAS M. JOHNSON, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No.

79-874

TREASURE ISLE, INC.,
Petitioner,

versus

THE HONORABLE GEORGE C. CARR, as Judge,
United States District Court for the
Middle District of Florida,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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IN THE Supreme Court of the United States OCTOBER TERM, 1979

No.

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versus

THE HONORABLE GEORGE C. CARR, as Judge,
United States District Court for the
Middle District of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, TREASURE ISLE, INC., respectfully prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Fifth Circuit entered on November 8, 1979. This order denied a petition for a writ of mandamus and/or prohibition directed to the respondent filed by the petitioner after its motion to compel the sentencing of a government witness prior to its trial or, in the alternative, suggesting the disqualification of the respondent was denied. The petitioner now prays that this Court review the order of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The November 8, 1979, order by the United States Court of Appeals for the Fifth Circuit is not reported. The unpublished order of that Court is set out in the appendix to this petition.

JURISDICTION

The order of the Court of Appeals which the petitioner seeks to have reviewed was entered on November 8, 1979. This petition is filed within 90 days of that order as required by Rule 22(1) of this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, in a federal criminal prosecution, a judge must disqualify himself from presiding at the trial after he has acquiesced to a negotiated plea agreement wherein he will defer sentencing of a prospective government witness until after the witness testifies on behalf of the government at the trial?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

The petitioner, and three of its officers and employees, were indicted by a federal grand jury in the United States District Court for the Middle District of Florida, Tampa Division, and charged with conspiracy, mail fraud, interstate transportation of money taken by fraud, and a violation of the RICO statute, 18 U.S.C. § 1961 *et seq.* The alleged criminal activity underlying this indictment is that petitioner defrauded the government by supplying frozen breaded shrimp to the United States Department of Defense that did not conform to contract specifications. It is alleged in the indictment that it was part of the conspiracy that the petitioner and the other defendants "* * *" would fraudulently promise, offer, give and cause to be given various gratuities "* * *" to Air Force inspectors assigned to Treasure Isle." This case is presently pending before the respondent for trial.

The respondent is also presiding over the case styled *United States v. Otho Christian Davis*, case number 79-70-CR-T-GC, United States District Court for the Middle District of Florida, Tampa Division. The indictment returned in that case charges defendant Davis with six counts of accepting bribes in violation of 18 U.S.C. § 201(g). The maximum sentence as to each count is two years imprisonment and a \$10,000 fine, or both. It is alleged in this indictment that Davis, while he was acting as the non-commissioned officer in charge of the United States Air Force Veterinary Food Inspection Unit at Treasure Isle, Inc., accepted bribes from petitioner "for and because of official acts performed and to be performed by him with respect to the inspection of shrimp produced on military contracts by Treasure Isle, Inc."

The time period covered by the Davis indictment coincides with the time period of the criminal activity alleged

in the indictment returned against petitioner. Davis is also named as an unindicted co-conspirator by the government in its bill of particulars filed in petitioner's case.

Subsequent to his indictment, Davis and the United States Attorney's Office for the Middle District of Florida entered into a written plea agreement (App. 1a-3a). By the terms of this plea agreement, Davis was to plead guilty to one count of the indictment. It was further agreed between Davis and the government that he was to receive a possible maximum sentence of only six months imprisonment as to this one count. It was also part of this plea agreement that Davis would testify, if called, "in any criminal proceedings involving the government's procurement of shrimp from contractors in Florida," and Davis' sentence was to be deferred until "completion of the Government's case against Treasure Isle, Inc., *et al.*" (App. 2a). This plea agreement was signed by an Assistant United States Attorney who is also one of the prosecutors in *United States v. Treasure Isle, Inc.*

On the same day this written plea agreement was executed, a change of plea proceeding took place before the respondent (App. 4a - 7a). Representing the government at this change of plea proceeding were the same attorneys who are the prosecutors in petitioner's case. At this change of plea proceeding, Davis withdrew his former plea of not guilty and entered a plea of guilty as to one count of the indictment returned against him. Davis acknowledged the written plea agreement described above, which agreement was filed with the court. After accepting the written plea agreement and Davis' oral plea of guilty, the respondent indicated that he intended to routinely sentence Davis after the completion

of his pre-sentence investigation report which was to be prior to petitioner's trial. However, after one of the government attorneys pointed out to the respondent that the plea agreement provided that Davis' sentencing was to be deferred until after the completion of the government's case against the petitioner, the respondent agreed to this procedure and deferred Davis' sentencing until "after the completion of the other case [*United States v. Treasure Isle, Inc.*] * * *". (App. 7a) It then became apparent that Davis would be a government witness at petitioner's upcoming trial.

The petitioner filed a sworn motion in the district court asking that Davis be sentenced prior to its trial or, in the alternative, that the respondent disqualify himself from presiding at that trial. This motion alleged that up until the time of his indictment and subsequent plea negotiations with the government, Davis gave no statements or evidence to the government which were incriminating to petitioner. In particular, a letter from the government which were incriminating to petitioner. In particular, a letter from the government prosecutor to defense counsel was attached as an exhibit to this motion, which letter stated that Davis, prior to his indictment, gave a sworn statement to the government wherein he "denied involvement in receiving gratuities." This sworn statement was directly contradictory to Davis' subsequent plea of guilty.

This motion also alleged that during the course of petitioner's trial it would be necessary for its counsel to attack Davis' credibility by cross-examining him as to the details of his plea agreement with the government, including the fact that the respondent had deferred his sentencing until after the completion of his testimony. Petitioner's motion pointed out that the expected

testimony of Davis during his cross-examination might unintentionally be embarrassing to the respondent and could possibly create an appearance of bias, in the eyes of the jury, on the part of the respondent in favor of the government.

After this motion was denied by the respondent, a petition for a writ of mandamus and/or prohibition presenting identical allegations was filed in the United States Court of Appeals for the Fifth Circuit. That court summarily denied the mandamus and/or prohibition petition.

REASON FOR GRANTING THE WRIT

IN A FEDERAL CRIMINAL PROSECUTION A JUDGE MUST DISQUALIFY HIMSELF FROM PRESIDING AT THE TRIAL WHEN HE HAS ACQUIESCED TO A NEGOTIATED PLEA AGREEMENT WHEREIN HE WILL DEFER SENTENCING OF A PROSPECTIVE GOVERNMENT WITNESS UNTIL AFTER THE WITNESS TESTIFIES ON BEHALF OF THE GOVERNMENT AT THE TRIAL.

As shown above, it is apparent that Davis — in exchange for dismissal of five of the six counts in his indictment and a reduction in his maximum exposure from six consecutive two-year prison sentences and six \$10,000 fines to a six-month prison sentence — has agreed to testify in support of the government's position at the petitioner's upcoming trial. To insure Davis' cooperation and supportive testimony, the government manipulated the respondent into deferring Davis' sentencing until after his testimony against petitioner.

By accepting the terms of the government's written plea agreement with Davis, the respondent became in in-

tegral part of the prosecution's scheme to extract supportive testimony from Davis. The government misused its powers of indictment, prosecution, and plea negotiations to intimidate and coerce Davis into contradicting his prior sworn and exculpatory testimony by becoming a prosecution witness. Its manipulation of our criminal justice system has maneuvered the respondent into an untenable and potentially embarrassing position.

This Court has held that due process of law guarantees a tribunal free from the appearance of bias. *In re Murchison*, 349 U.S. 133 (1955); *Offutt v. United States*, 348 U.S. 11 (1954).

In *Murchison*, this Court held that a trial before the same judge who had conducted a "one-man judge-grand jury" violated the due process clause of the Fourteenth Amendment. Mr. Justice Black, speaking for the majority, explained this facet of due process:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent *even the probability of unfairness*. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. * * * But to perform its high function in the best way "justice must satisfy the appearance of justice."

It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of

his investigations. * * * Having been a part of that [grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. * * * 349 U.S. at 136-137 (footnotes and citations omitted and emphasis added).

The *Murchison* rationale has been followed by the federal trial judges. For example, in *United States v. Zarowitz*, 326 F. Supp. 90 (C.D. Cal. 1971), District Judge Hauk *sua sponte* recused himself because he had become entangled in the prosecutorial function by compelling the testimony of recalcitrant immunized witnesses before the grand jury which indicted the defendant. Judge Hauk concluded that this activity might show the *appearance* of possible bias or prejudice in favor of the government, and he said:

* * * Like Caesar who parted from his wife Pompeia because she was not above suspicion, so here to avoid even the appearance of the possibility of personal bias or prejudice, wise discretion and sound judgment compel us to leave this case, however reluctant we are to thrust its burden upon another Judge of our Court or to cause any delay or inconvenience to the parties. 326 F. Supp. at 92 (footnote omitted).

The order of the Fifth Circuit denying the petitioner's petition for a writ of mandamus and/or prohibition is in direct conflict with the constitutional principle enunciated by this Court in *In re Murchison* and *Offutt v. United States*. The Fifth Circuit's order effectively sanctions judicial cooperation in the prosecutor's misuse of his indictment and plea negotiation powers to coerce supportive testimony from a previously nonsupportive witness. The respondent's failure to either sentence this witness before the petitioner's trial or to disqualify himself from presiding at that trial creates the *appearance* of his possible bias in favor of the government. Therefore, this Court must grant certiorari because the Fifth Circuit's order directly conflicts with the cited decisions of this Court.

* * *

This Court also has the authority and responsibility to establish standards for the fair administration of justice in the federal courts on non-constitutional grounds. *United States v. Hale*, 422 U.S. 171 (1975); *Offutt v. United States*, 348 U.S. 11, 13 (1954); *McNabb v. United States*, 318 U.S. 332 (1943). The respondent, by acquiescing to the government's manipulation of the federal criminal justice system to coerce the support of an unfavorable witness, has put himself in a position incompatible with the fair administration of justice. In accord with its supervisory power over the federal judicial system, this Court must correct this judicial involvement in the prosecutorial function.

Consequently, this Court must grant certiorari in this case and, after briefing and oral argument, reverse the lower court and order that a writ of mandamus and/or prohibition directed to the respondent be issued.

CONCLUSION

In view of the vital importance of the question presented and the consideration set forth above, this Court must grant this petition for writ of certiorari.

Respectfully submitted

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APPENDIX A UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF	:	
AMERICA	:	
v.	:	CASE NO. 79-70-CR-T-GC
	:	
OTHO C. DAVIS	:	

PLEA AGREEMENT

The Defendant OTHO C. DAVIS and the United States Attorney mutually agree as follows.

The Defendant shall enter a plea of guilty to Count 2 of the Indictment, and the parties agree:

That the Defendant shall be sentenced to six (6) months imprisonment. In the event this Court accepts this agreement, the Government will, at the time of sentencing, move to dismiss Counts 1, 3, 4, 5 and 6 of the Indictment.

It is understood that the Court may impose a less severe sentence than that (if any) embodied in this agreement; but in the event the Court otherwise rejects this agreement; the Defendant shall then be given an opportunity to withdraw his plea of guilty.

The Defendant acknowledges that he is entering into this agreement and is pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the Government and the Defendant or his attorney and without promise of benefit of any kind (other than the concessions contained herein); and without threats, force, intimidation or coercion of any kind. The Defendant further acknowledges his understanding of the nature of the offense or offenses

to which he is pleading guilty, and the elements thereof, including the penalties provided by law; and his complete satisfaction with the representation and advice received from his undersigned counsel. The Defendant also understands that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury with the assistance of counsel, the right to confront and cross examine the witnesses against him, the right not to be compelled to incriminate himself, and the right to compulsory process for the attendance of witnesses to testify in his defense; but by pleading guilty he waives or gives up those rights and there will be no trial. The Defendant further understands that if he pleads guilty or testifies in any criminal matter the Court or the Government may ask him questions about the offense or offenses to which he had pleaded, and if he answers those questions under oath, on the record and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement. The Defendant also understands that he will be adjudicated guilty of the offense or offenses to which he had pleaded and may thereby be deprived of certain civil rights such as the right to vote, to hold public office, to serve on a jury, and to have possession of firearms. Furthermore, the Defendant agrees to testify if called, fully, completely and truthfully in any criminal proceedings involving the Government's procurement of shrimp from contractors in Florida, and pursuant to this agreement sentence is to be deferred until completion of the Government's case against *Treasure Isle, Inc. et al.*

This Agreement shall be presented to the Court, in open court, and filed in this cause, at the time of re-arraignment for the purpose of Defendant's entry of a plea of guilty pursuant hereto.

The undersigned counsel certify that this Agreement has been read by (or has been read to) the Defendant, and that Defendant fully understands its terms.

Dated this 11th day of October, 1979.

GARY L. BETZ
United States Attorney

Defendant (Individually)

By: LYNN HAMILTON COLE
Assistant United States At-
torney

Counsel for Defendant

MANUEL MEMENDEZ, JR.
Assistant United States At-
torney

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF)	
AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO: 79-70-CR-T-GC
)	
OTHO CHRISTIAN DAVIS,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS
(Change of Plea)

THIS CAUSE came on to be heard before Honorable George C. Carr, Judge, U.S. District Court, in Courtroom 3, Federal Building, Tampa, Florida, on Thursday, October 11, 1979, commencing at approximately 1:00 p.m.

The United States of America was represented by Ms. Lynn Cole, Assistant United States Attorney, Post Office Box 2841, Tampa, Florida 33601 and by Mr. Breckinridge L. Willcox, Assistant United States Attorney, Department of Justice, Criminal Division, Washington, D.C.

The defendant was presented and represented by Mr. Gary Trombley, Winkles & Trombley, P.A., Attorneys at Law, 412 East Madison Street, Suite 100, Tampa, Florida, 33602.

THEREUPON, the following proceedings were had and taken:

[24] THE COURT: Now, Mr. Trombley, as Counsel for the defendant, do you assure the Court that as far as you know, no assurances, promises or understandings have been given the defendant as to a disposition of this case which are different or contrary to what has just been discovered here?

MR. TROMBLEY: I would assure the Court that there have not been, and the only promises —

THE COURT: Ms. Cole, Mr. Willcox, can you give the Court the same assurance?

MS. COLE: I can, Your Honor, except that is that I'm assuming the Court is incorporating the plea agreement, not all of which has been read into the record. The only understanding is what is accepted in the plea agreement, Your Honor, yes.

THE COURT: That was the Court's intention, Mr. Willcox?

MR. WILLCOX: Yes sir, I agree with that.

THE COURT: Having heard all of your rights, the explanation of the effect of the plea of guilty, do you still desire, Mr. Davis, to plead guilty as to count 2 of the indictment?

MR. DAVIS: Yes sir.

THE COURT: The Court finds that you, Otho Christian Davis, are now alert, intelligent, that [25] you understand the nature of the charge against you and the possible penalties, and appreciate the consequences of pleading guilty. The facts which the Government is prepared to prove, and which by your plea you admit state all of the essential elements of the offense with which you are charged. The Court further finds that your decision to plead guilty is freely, voluntarily, knowingly and intelligently made, and that you had the advice from Counsel of a competent lawyer with whom you say you are satisfied. The plea of guilty is accepted,

and the probation officer is hereby directed to conduct a pre-sentence investigation and report back to the Court at its earliest convenience. Is the probation office represented?

MR. MAYNARD: Yes sir.

THE COURT: I see. How long do you think it will take, sir?

MR. MAYNARD: Approximately five weeks, Your Honor.

THE COURT: All right. Mr. Davis — well, let me ask this. Is Mr. Davis on bond?

MR. TROMBLEY: Judge, he's on his own personal recognizance.

THE COURT: All right. Do you have any [26] objection to continuing that arrangement?

MS. COLE: We do not.

THE COURT: All right. We'll continue the same recognizance bond that's already in force. And Mr. Davis, you will be advised by mail, you and your attorney as to a date for the sentencing. I'm not going to set a date now. And it will be sometime after the Court has received the pre-sentence report and had an opportunity to review and consider it. At that time, you'll be noticed. It will be five to six weeks, in all probability.

MR. WILLCOX: Your Honor, we should point out that part of the agreement, on page 2, is that the sentence —

THE COURT: Do you have the agreement there?

THE CLERK: Yes sir.

MR. WILLCOX: At the bottom of the full paragraph on page 2, Your Honor, pursuant to this agreement, the sentence is to be deferred until completion of the Government's case against Treasure Isle, Incorporated, et al.

THE COURT: Now, where is that?

MR. WILLCOX: It is the last clause at the bottom of the first — the only full paragraph — [27] I'm sorry. The first — the first large paragraph on page 2, the last three lines of the long paragraph.

THE COURT: All right. You have no objection to that, Mr. Trombley?

MR. TROMBLEY: No objection.

THE COURT: Mr. Davis?

MR. DAVIS: No sir.

THE COURT: All right. We'll do that, then. It will be sent, if you'll note that, Mr. Henry.

THE CLERK: Yes, Your Honor.

THE COURT: I don't mean, now, the probation officer should defer their pre-sentence investigation. You'll continue with that and file it with the Court when completed. However, we will defer sentencing as agreed upon until after completion of the other case, unless the Court is advised to the contrary by mutual agreement. I would remind you, Mr. — where do you live now, Mr. Davis?

MR. DAVIS: I live at 6585 Vinecrest Drive, Salt Lake City, Utah.

THE COURT: Is that the right address? Let's make sure we have it, Mr. Henry, in the file.

* * *

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS

FILED

No. 79-3654

NOVEMBER 8, 1979

In Re:

TREASURE ISLE, INC.,
Petitioner,

On Petition for Writ of Mandamus and/or Prohibition to the United States District Court for the Middle District of Florida

Before GOLDBERG, RUBIN and POLITZ, Circuit
Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is DENIED.